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No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CESAR ELIAS CRIBAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN,
Attorney General of the
State of California
GEORGE WILLIAMSON,
Chief Deputy Attorney General
HARLEY D. MAYFIELD,
Assistant Attorney General
FREDERICK R. MILLAR, JR.,
Supervising
Deputy Attorney General
PAMELA A. RATNER,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-6986

Counsel for Petitioner
State of California

QUESTIONS PRESENTED

1. The issue presented in this petition, which was expressly reserved in *Michigan* v. *Harvey*, 494 U.S. ___, [108 L.Ed.2d 293, 305, 110 S.Ct. 1176] (1990), and is the subject of numerous conflicting state and federal decisions, is whether evidence obtained in violation of the Sixth Amendment right to counsel, as interpreted in *Massiah* v. *United States*, 377 U.S. 201, [12 L.Ed.2d 246, 84 S.Ct. 1199] (1964), may be used for impeachment purposes?

2. Does the admissibility of such evidence for impeachment purposes hinge on a distinction between judicially created prophylactic rules and constitutional guarantees or, instead, on a balancing of the policy behind an exclusionary rule against the policy which demands truth from witnesses?

3. Whether respondent's statements to a prosecuting witness and victim of a crime, obtained in violation of the Sixth Amendment, are admissible for impeachment purposes under circumstances where the traditional standards for evaluating voluntariness and trustworthiness indicate an absence of coercion and duress?

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PEOPLE OF THE STATE OF CALIFORNIA,

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v.

CESAR ELIAS CRIBAS,

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the People of the State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Three, issued on June 21, 1991.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Three is reported at 231 Cal.App.3d 596 and 282 Cal.Rptr. 538 and appears as Appendix A (pages A-1 through A-17.)

The order of the Supreme Court of California denying Petitioner's petition for review is reproduced in Appendix B at page A-18.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(a) to review a judgment of the California Court of Appeal, Fourth Appellate District, Division Three which was entered on June 21, 1991. The California Supreme Court denied review in this case on September 26, 1991. The present petition for writ of certiorari is filed

within the required 90-day period following the final entry of judgment. The judgment of the Court of Appeal became final for the purposes of this Court with the denial of review by the California Supreme Court on September 26, 1991. (*Market Street Railroad Co.* v. *Railroad Commission*, 324 U.S. 548, 550-552, [89 L.Ed. 1438, 65 S.Ct. 1020 (1945).) Thus, the instant judgment is a final decision rendered by the highest court of the State of California interpreting rights under the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

> confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment XIV [pertinent part]:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

STATEMENT OF FACTS

In early March of 1989, respondent met Ernesto Rojas and his girlfriend, Luisa B., in the laundry room of their apartment building, where respondent resided. (RT 69-70.) Rojas and Luisa had been living with Rojas' uncle but were

having problems there. Respondent offered to allow them to move into his apartment, stating he would be glad to have help with the rent. (See RT 202.)

Sometime after the two moved into the apartment, respondent made an unsolicited advance toward Luisa while Rojas was away. As Luisa was cooking, respondent approached her, fondled one of her breasts, and put a hand down her pants. (RT 75-77.) Respondent told Luisa not to tell Rojas about the incident. (RT 77.) When Rojas came home, however, Luisa told him what happened. Rojas became angry and threatened to hit respondent, but Luisa talked him out of it by reminding him they would have to move out and had no place to go. (RT 84-85.)[1]

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[1] Apparently the financial situation of Rojas and Luisa was poor. Although Luisa worked and earned money to contribute to the rent and to pay for food, Rojas was looking for work and was unemployed. (RT 73-74; see also, 196, 228.)

The following day, respondent and Rojas were drinking. After a while, respondent gave Rojas some money to buy some liquor and sent him out with the keys to his car. (RT 89-93.) When Rojas left, Luisa got up to go after him but was stopped by respondent. He took her to the couch and began kissing her forcefully. At one point, Luisa managed to break free and ran to the door, but respondent followed her and locked it with the deadbolt. (RT 95-98.) Respondent grabbed Luisa and pushed her down on the floor. (RT 98.) He got on top of Luisa and started to bring her skirt up and to spread her legs. (RT 99-100.) Respondent then got up, raised the volume on the tape recorder, carried Luisa to the bedroom where he bolted the door and forcibly had sexual intercourse with her. (RT 100-109.)

Shortly thereafter, they heard Rojas pounding on the bedroom door. (RT 110.) Respondent immediately got up, which allowed Luisa to break free and unlock the door. She ran into Rojas' arms, crying. (RT 110-111.) Rojas, who was furious, called the police after Luisa told him that respondent had raped her. (See RT 187-188.)

The following day, Luisa received a telephone call from respondent, calling from the jail, urging her to withdraw the charges so that he could get out of jail. He told her his attorney would take care of having the charges dropped. At one point, Luisa put the phone down, and the call was disconnected. (RT 189-191.) Respondent also spoke to Rojas, apologized to him and asked him to forgive him for what had happened. Respondent claimed that he did not know what he was doing, as he had been drinking. (RT 227.)

Later on in the day, Rojas and Luisa were visited by respondent's brother, Danilo Cribas; Rojas spoke to him at that time. Danilo offered Rojas and Luisa $300 if they would help respondent by withdrawing the charges. (RT 192.) Rojas would not agree to anything at that time. (RT 192.) A few days later, Danilo came to the apartment and offered to pay them $500. (RT 194.) At that time, Danilo told Rojas that he should convince Luisa to accept the money. (RT 195.) He also told Rojas that they should tell the police that the day the offense happened Rojas was drunk, that he had hit his girlfriend, and that "she suffers from nervousness." (RT 195.) Rojas said that they would have to pay $5,000. He chose this figure thinking that they would never have that kind of money and would leave them alone. (RT 196.)

After this conversation, Luisa and Rojas went to the police station and reported what respondent and his brother had attempted to do. (RT 116, 196.) Due to the fact that Luisa and Rojas had been evicted, the police got them a motel room. (RT 197.) The police instructed them that, if offered money again, they should accept. (RT 197.) The police also arranged to have a tape recorder attached to the telephone. (RT 198.)[2] When Rojas went to the apartment to get his clothes, he ran into Danilo Cribas. Danilo wanted to know where they were living and wanted their telephone number. (RT 221.) At that time, Rojas told Danilo that Luisa

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[2] At the hearing on respondent's motion to suppress, evidence was presented that police told Luisa to speak with respondent and ask him why he had raped her; this was done in order to obtain respondent's admission so as to bolster the bribery offense which was under investigation. (RT 22, 28.)

wanted to hear from respondent. (RT 221-222.)

Respondent subsequently telephoned and spoke at length with Luisa. He admitted he had raped her and blamed it on the alcohol; he also asked her to withdraw the charges so he could get out of custody.[3] (RT 120; see also, People's Exhibit 6.)

It was not long before Rojas and Luisa received another call from Danilo offering to pay $1,000. (RT 199.) Danilo also made a subsequent call and made arrangements to have the money brought. (RT 199.) Danilo was later arrested when he attempted to complete the transaction. (RT 237-238.) At the time of his arrest, Danilo Cribas had a total of $2,116 on his person. (RT 238.)

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[3] This was the recorded telephone conversation offered for impeachment purposes.

Defense

Respondent testified on his own behalf at trial. (RT 252.) He testified that after Rojas left the liquor store, Luisa approached him while he was in his bedroom making a telephone call. There, she made sexual overtures and he tried to respond, but was unable to achieve an erection. He did not know the bedroom door was locked and believed Luisa locked it. When Rojas began shouting and knocking on the door, Luisa unlocked it and began crying. Respondent denied previously fondling Luisa the day before. (RT 259, 265-270.)

Although respondent admitted calling Rojas and Luisa from the jail and asking if they could help him get out of jail by withdrawing the charges, he claimed that it was Rojas who asked for money. (RT 274-276.) Respondent testified that when he telephoned, Luisa asked him a lot of

questions and he told her what she wanted to hear, in hopes she would withdraw the charges. (RT 286.)

On cross-examination, the prosecutor impeached respondent with his recorded telephone conversation with Luisa where he admitted the rape. (RT 301-302.) The actual tape recording, as well as the transcript of the recording, were also received into evidence for impeachment purposes. (RT 122, 242-243, 313-314; People's Exhibits 2, 3, and 6.)

All of this evidence was offered for the purpose of showing respondent was lying when he testified that he had not raped Luisa, and that, instead, she had made sexual advances to him; this evidence was also offered to show respondent was lying when he testified that he had later admitted the rape to Luisa for the sole purpose of getting her to "drop the charges."

STATEMENT OF THE CASE

In an information filed by the District Attorney of Orange County on June 23, 1989, respondent was charged with one count of forcible rape, in violation of California Penal Code section 261, subdivision (2); one count of bribing witnesses in order to influence their testimony, in violation of California Penal Code section 137, subdivision (a); and one count of conspiring to bribe witnesses, in violation of California Penal Code section 182. (CT 244-246.)[4]

On November 8, 1989, respondent filed a motion, pursuant to California Penal Code section 1538.5, to suppress statements made by him in a taped

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[4] "CT" refers to the Clerk's Transcript of the trial court's documents and orders. "RT" refers to the reporter's transcript of the trial court proceedings. The Clerk's and Reporter's Transcripts were part of the official record before the California Court of Appeal and California Supreme Court.

telephone call as obtained in violation of the Sixth Amendment. (CT 254-460.) Respondent's motion was subsequently denied. (CT 276.)

On November 13, 1989, a jury trial commenced. (CT 268.) Respondent testified at the trial in his defense. The prosecution used respondent's recorded statements to impeach him. (RT 301-302.)

On November 21, 1989, the jury found respondent guilty of forcible rape, bribery of witnesses and conspiracy to bribe witnesses, as charged. (CT 370-371.)

On January 26, 1990, respondent was sentenced to the lower term of three years for his conviction of rape. He received an additional eight months, consecutive, for his conviction of bribing witnesses. The sentence on respondent's conviction for conspiracy was ordered stayed. (CT 381.)

On February 15, 1990, respondent filed a notice of appeal from the judgment. (CT 396-397.)

On June 21, 1991, in a published opinion, the Court of Appeal, Fourth Appellate District, Division Three, affirmed in part and reversed in part. The court reversed respondent's conviction of forcible rape, holding that statements made by him and admitted for impeachment purposes were obtained in violation of the Sixth Amendment to the Constitution; the court ruled evidence obtained in violation of the Sixth Amendment cannot be used for impeachment purposes. (Appendix A.)

On September 26, 1991, the California Supreme Court denied petitioner's petition for review. (Appendix B.)

HOW THE FEDERAL QUESTION IS PRESENTED

In the trial court, respondent moved to suppress evidence of his statements, made in a recorded telephone conversation, on the ground that the statements were obtained in violation of the Sixth Amendment and *Massiah* v. *United States*, *supra*, 377 U.S. at p. 201. The prosecution sought to admit this evidence solely for impeachment purposes. (See CT 276; see also, RT 18, 313.) The trial court denied respondent's motion to suppress and ruled the statements obtained could be used by the prosecution for impeachment purposes. (CT 276; see also, RT 53.)

Respondent subsequently testified at trial in his defense. The prosecution used respondent's recorded statements, wherein respondent made admissions to the victim acknowledging the rape, to impeach respondent's previous inconsistent

testimony to the jury. (RT 252, 301-302; see also, People's Exhibit 6.) Additionally, the prosecution's motion to admit the tape recording and a transcript of the tape recording was granted. (RT 122, 242-243, 313-314.)

In the California Court of Appeal, Fourth Appellate District, Division Three, respondent contended statements he made to the victim were obtained in violation of the Sixth Amendment to the federal Constitution and *Massiah* v. *United States*, *supra*, 377 U.S. 201, and were accordingly improperly admitted. Petitioner argued that respondent's statements were not obtained in violation of the Sixth Amendment and, in any event, the evidence was appropriately admitted. The California Court of Appeal, Fourth Appellate District, Division Three, concluded that respondent's taped telephone statements were indeed taken in

violation of the Sixth Amendment to the United States Constitution and such evidence could not be admitted for any purpose, including for the purpose of impeachment. (Appendix A.)

Petitioner filed a petition for review in the California Supreme Court arguing that the Court of Appeal improperly held as a matter of law that statements obtained in violation of the Sixth Amendment cannot be used for impeachment purposes. Petitioner further argued that under *Michigan* v. *Harvey*, *supra*, 494 U.S. ____, [108 L.Ed.2d 293], respondent's statements could properly be used against him for impeachment purposes, and the exclusionary rule should not bar the use of illegally seized evidence to impeach a criminal defendant. The California Supreme Court denied petitioner's petition for review. (Appendix B.)

ARGUMENT

I.

STATEMENTS OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT SHOULD BE ADMISSIBLE FOR IMPEACHMENT PURPOSES

The issue presented in this case is whether the rationale employed by the Court in *Walder* v. *United States*, 347 U.S. 62, [74 S.Ct. 354, 98 L.Ed. 503] (1954), *Harris* v. *New York*, 401 U.S. 222, [91 S.Ct. 643, 28 L.Ed.2d 1] (1971), and *Oregon* v. *Hass*, 420 U.S. 714, [95 S.Ct. 1215, 43 L.Ed. 570] (1975), applies here, where statements were obtained in violation of respondent's Sixth Amendment right to counsel, as interpreted in *Massiah* v. *United States*, *supra*, 377 U.S. 201. Specifically, the question presented is whether statements obtained in

violation of the Sixth Amendment may be used for impeachment purposes.[5]

A. The Court Of Appeal's Rule Of Admissibility Rests Improperly On Whether The Proffered Statements Were Taken In Violation Of A Prophylactic Rule Or Were Taken In Violation Of The Constitution Simply And Unequivocally.

The California Court of Appeal in this case reversed respondent's rape conviction, holding that respondent's statements were obtained in violation of the Sixth Amendment to the Constitution, simply and unequivocally, rather than in violation of "`only a prophylactic rule,'" relying on its interpretation of this Court's decision in *Michigan* v. *Harvey*, *supra*, 494 U.S. ___, [108 L.Ed.2d 293]. The Court of Appeal held that statements taken in violation of "`only a

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[5] We do not challenge the California Court of Appeal decision finding there was a violation of the Sixth Amendment to the Constitution.

prophylactic rule'" may be used for impeachment purposes, however, statements taken simply and unequivocally in violation of the Constitution cannot be used for any purpose, including for the purpose of impeachment. (*People* v. *Cribas*, *supra*, 231 Cal.App.3d at p. 606.)

The Court of Appeal fashioned a new rule of admissibility contingent on whether evidence is obtained in violation of a *core right* versus a *prophylactic rule*. In so holding, the Court of Appeal has ignored definitive declarations by this Court that a defendant may not "turn the illegal method by which evidence in the Government's possession was obtained to his own advantage and provide himself with a *shield* against contradiction of his untruths." (*Walder* v. *United States*, *supra*, 347 U.S. at p. 65; italics added; *Harris* v. *New York*, *supra*, 401 U.S. at p.

224; see also, *Oregon* v. *Hass*, *supra*, 420 U.S. at pp. 721-723.)

In addition, the Court of Appeal's reliance on a technical distinction between *core* and *prophylactic rule* violations is misguided. The Court's decision in *Michigan* v. *Harvey*, *supra*, 494 U.S. ___, [108 L.Ed.2d 293], never defined the rule of admissibility of evidence for impeachment purposes as hinging on a distinction between a "prophylactic" and "core" violation.

Instead, in evaluating whether illegally obtained evidence may be used to impeach a criminal defendant, this Court has consistently balanced the policy of the exclusionary rule against the policy which demands truth from witnesses in adversary proceedings. (See *Oregon* v. *Hass*, *supra*, 420 U.S. at pp. 721-723; *Harris* v. *New York*, *supra*, 401 U.S. at pp.

224-225; *Walder* v. *United States*, *supra*, 347 U.S. at p. 65.)

Moreover, any reliance on a *core* versus *prophylactic* distinction is belied by the Court's decision in *Walder* v. *United States*, *supra*, 347 U.S. 65, where it was held that a violation of the Fourth Amendment would not preclude the use of evidence seized, via an illegal method, for impeachment purposes. (*Ibid.*) The violation in *Walder* was as "`simply and unequivocally'" (*People* v. *Cribas*, *supra*, 231 Cal.App.3d 606, quoting *People* v. *Harper*, 228 Cal.App.3d 843, 852 [279 Cal.Rptr. 204] (1991)), a violation of the Fourth Amendment as the violation in the instant case was of the Sixth Amendment.

In *Walder* v. *United States*, *supra*, the Court held that evidence obtained in violation of the Fourth Amendment, although not admissible to secure a conviction, could, in fact, be admissible

for impeachment purposes. A defendant may not "affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." (*Id.*, at p. 65.) To allow otherwise, "would be a perversion of the Fourth Amendment." (*Id.*)

Subsequently, in the Fifth Amendment context, the Court in *Harris* v. *New York*, *supra*, 401 U.S. 222, used the same rationale in allowing statements obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), to be used for impeachment purposes, provided of course that the trustworthiness of the evidence satisfied legal standards. (*Id.*, at pp. 224-225.)

> "The shield provided by *Miranda*, *supra*, cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (*Id.*, at p. 226.)

Such would be a perversion of the Fifth Amendment.

Similarly, the court in *Oregon* v. *Hass*, 420 U.S. 714 [95 S.Ct. 1215, 43 L.Ed. 570] (1975), held that evidence obtained in violation of the Fifth Amendment may be admissible for impeachment purposes. "We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution." (*Id.*, at p. 722.) The Court noted that if the statements sought to be admitted were obtained through government conduct amounting to abuse, such a case, like those involving coercion or duress, could be appropriately measured by "the traditional standards for evaluating voluntariness and trustworthiness." (*Oregon* v. *Hass*, *supra*, 420 U.S. at p. 723.)

Recently, in *Michigan* v. *Harvey*, *supra*, 494 U.S. ___, 108 L.Ed.2d 293, the Court held that a statement to police taken in violation of *Michigan* v. *Jackson*, 475 U.S. 625 [89 L.Ed.2d 631, 106 S.Ct. 1404] (1986), could, in fact, be used to impeach a defendant's testimony. In *Michigan* v. *Jackson*, *supra*, the Court created a bright-line rule for deciding whether an accused who has "asserted" his Sixth Amendment right to counsel has subsequently waived that right. In denying the argument a *Jackson* violation implicates the Sixth Amendment such that a different result was justifiable, the Court stated that "nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney." (*Michigan* v. *Harvey*, *supra*, [108 L.Ed.2d at p. 303].) The Court, once

again, decided that the "'search for truth in a criminal case' outweighs the 'speculative possibility' that exclusion of evidence might deter future violations of rules not compelled directly by the constitution in the first place. [citations omitted]." (*Ibid.*)[6]

The court reiterated:

> "The prosecution must not be allowed to build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially-created protections. <u>But use of statements so obtained for impeachment purposes is a different matter</u>. If a defendant exercises his right to testify on his own behalf, he assumes a reciprocal 'obligation to speak truthfully and accurately,' [citation omitted], and we have consistently rejected argument that would allow a defendant to

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[6] This Court specifically left open the question of the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the right to counsel. (*Michigan* v. *Harvey*, *supra*, 494 U.S. ___, [108 L.Ed.2d at p. 305].)

> `"`turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.'"' [Citations omitted]." (*Michigan* v. *Harvey*, *supra*, 494 U.S. ___, [108 L.Ed.2d 293, 302-303]; emphasis added; see also, *Oregon* v. *Hass*, *supra*, 420 U.S. at p. 722; *Walder* v. *United States*, *supra*, 347 U.S. at p. 65; *United States* v. *Havens*, 446 U.S. 620, 626, [100 S.Ct. 1912, 1916-1917, 64 L.Ed.2d 559] (1980).)

The decision by the Court of Appeal, here, narrowly reads *Michigan* v. *Harvey*, *supra*, in order to establish a new rule regarding the admissibility of illegally obtained evidence for impeachment. However, why is a violation of the Sixth Amendment any more compelled ["core"] than a violation of the Fifth or Fourth Amendment? (*Oregon* v. *Hass*, *supra*, 420 U.S. 714; *Harris* v. *New York*, *supra*, 401 U.S. 222; *Walder* v. *United States*, *supra*, 347 U.S. 62.) The Court of Appeal's reliance on distinction between a

violation of a *prophylactic rule* and a violation which is deemed *core* and in a pristine form, finds no support in this Court's prior decisions.

Certiorari should be granted to consider the important federal question left open in *Michigan* v. *Harvey*, *supra*, 494 U.S. ___, [108 L.Ed.2d at p. 305], pertaining to the admissibility for impeachment purposes of statements taken in violation of the Sixth Amendment.

B. There Is A Conflict Between The Lower Courts On This Issue.

Lower courts are divided on whether statements obtained in violation of the Sixth Amendment are admissible for impeachment.

Some state and federal courts which have addressed the issue have taken the approach that a separate set of Sixth Amendment principles should apply that *always* results in suppression of the illegally seized evidence for impeachment.

(See e.g., *United States* v. *Brown*, 699 F.2d 585, 588-591 (2d Cir. 1983); *People* v. *Gonyea*, 421 Mich. 462, 477-483, [365 N.W.2d 136, 143-145] (1984).)

However, there are a number of state and federal courts which have decided that such evidence can in fact be introduced as impeachment evidence, just as evidence obtained in violation of the Fourth and Fifth Amendments can be introduced and for the identical reasons. (See e.g., *Martinez* v. *United States*, 566 A.2d 1049 (D.C. App. 1989); *State* v. *Swallow*, 405 N.W.2d 29, 39-41 (S.D. 1987); *State* v. *Thomas*, 698 S.W.2d 942, 947-949 (Mo.Ct.App. 1985); *People* v. *Ricco*, 56 N.Y.2d 320 [437 N.E.2d 1097, 1100] (1982); *United States* v. *McManaman*, 606 F.2d 919, 924-925 (10th Cir. 1979); *United States* v. *Frank*, 520 F.2d 1287, 1291 (2d Cir. 1975), cert. denied, 423 U.S. 1087 [96 S.Ct. 878, 47 L.Ed.2d 97] (1976). *People* v. *Bacino*,

41 Ill.App.3d 738, 739, [354 N.E.2d 641, 642] (1976); *Tate* v. *United States*, 109 U.S.App.D.C. 13, 15, [283 F.2d 377, 379] (1960).) Each of these cases relied on one or more of the three previously cited Supreme Court decisions: *Walder* v. *United States*, *supra*, 347 U.S. 62, the seminal case on the subject of impeachment with illegally obtained evidence, and that case's two main progeny, *Harris* v. *New York*, *supra*, 401 U.S. 222, and *Oregon* v. *Hass*, *supra*, 420 U.S. 714.[7]

The courts which have admitted such evidence for impeachment purposes have appeared to reach this conclusion after a cautious balancing of two competing policies of the law:

(1) the policy that proscribes, as a prophylactic measure, the use of evidence

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[7] All of these cases, of course, were decided prior to *Michigan* v. *Harvey*, *supra*.

obtained in violation of a rule of law [an exclusionary rule], and

(2) the policy which demands truth from witnesses in the judicial process and which regards an adversary judicial proceeding as a search for truth.

Petitioner submits certiorari should also be granted to resolve the conflict which exists in the lower courts as to the question of whether statements obtained in violation of the Sixth Amendment can be used for impeachment.

C. Our System Of Truth And Justice Depends On The Admissibility Of Evidence For Impeachment Unless Exclusion Is Constitutionally Compelled.

Since the credibility of witnesses is of the utmost importance as a factor in the jury's search for truth, impeachment by a prior inconsistent statement, even one illegally obtained, aids the jury in its truth-seeking function. (See *United States* v. *Havens*, *supra*, 446 U.S. 620,

626-628, 100 S.Ct. at pp. 1916-1917; *Hawthorne* v. *United States*, 504 A.2d 580, 591 (D.C. 1986) ("any unchecked lie is likely to enhance a witness' credibility." ([Citations omitted]; cert. denied, 479 U.S. 992 [107 S.Ct. 593, 93 L.Ed.2d 594] (1986).) Balanced against the tradition of using the adversary process and the jury system as truth-seeking mechanisms is the competing policy of deterring future police misconduct.

Admittedly, police may have little to lose and something to gain by questioning a defendant who has invoked his Sixth Amendment right to counsel. However, as in Fifth Amendment cases, the balance should be struck in favor of admitting impeachment material obtained by such questioning unless the statement was obtained by the use of abusive tactics, coercion, or duress. If statements <u>are</u> obtained by abusive or coercive measures,

then the exclusionary rule and its twin supports, the usual standards for judging the voluntariness and trustworthiness of statements, will be available to take care of the matter. (E.g., *Maine* v. *Moulton*, 474 U.S. 159 [106 S.Ct. 477, 88 L.Ed.2d 481] (1985).)

The Court of Appeal here improperly likens this case with the Government overreaching and manipulation found in *Maine* v. *Moulton*, *supra*, 474 U.S. 159, [88 L.Ed.2d 481, and *United States* v. *Henry*, 477 U.S. 264 [65 L.Ed.2d 115, 100 S.Ct. 2183] (1980). The Court of Appeal accordingly concludes that the rape victim in this case was an "informant." Further, because the victim/witness was receiving a motel room at taxpayer expense, the court finds that she was "a *paid* informant." (*People* v. *Cribas*, *supra*, 231 Cal.App.3d at pp. 603-604, emphasis added.) However, the evidence shows the rape victim in this

case was a Mexican alien who, together with her husband, had no substantial income or housing. (See RT 73, 118, 128.)

Moreover, although the statements here were obtained in violation of the Sixth Amendment, the statements were trustworthy and reliable under the circumstances of this case.

Where the statements are otherwise voluntary and trustworthy, the statements should be admitted for impeachment purposes in order to allow the jury the means of ascertaining the truth. Respondent voluntarily chose to speak to the victim he raped, and he had no reasonable expectation the victim would not attempt to use those statements against him, particularly where those statements were made in the context of bribing and intimidating the victim. Accordingly, he should not be permitted to

subsequently hide behind the Sixth Amendment to commit perjury.

The "shield" provided by the Sixth Amendment should not be perverted into a "sword" to commit perjury. (See *Walder* v. *United States*, *supra*, 347 U.S. at p. 65; *Harris* v. *New York*, *supra*, 401 U.S. at pp. 224-225; and *Oregon* v. *Hass*, *supra*, 420 U.S. at pp. 721-722.)

The exclusionary rule serves the entirely valid and useful purpose of preventing, but not repairing, police conduct that results in a constitutional violation. (See *Michigan* v. *Tucker*, 417 U.S. 433, 446, [94 S.Ct. 2357, 2364, 41 L.Ed.2d 182] (1974); *United States* v. *Calandra*, 414 U.S. 338, 347 [38 L.Ed.2d 561, 94 S.Ct. 613, 619] (1974).) However, the policy that proscribes, as a prophylactic measure, the use of evidence obtained in violation of an exclusionary

rule must be balanced against the policy that demands truth from witnesses.

D. Conclusion.

The decision by the Court of Appeal misconstrues this Court's decision in *Michigan* v. *Harvey*, *supra*, and has adopted a new rule of exclusion of evidence for impeachment purposes that is inconsistent with the Court's rationale stated in *Walder*, *Harris* and *Hass*, *supra*. This rule will permit a defendant to lie with immunity in the face of illegally obtained, and previously made, inconsistent statements by him, committing perjury in the name of the Sixth Amendment.

If a defendant elects to testify on his own behalf, he must speak truthfully and accurately and the prosecution should and must be able to confront him with any inconsistent statements in order to preserve the truth-seeking process. The

"shield" provided by the exclusionary rule should not be "perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (*Harris* v. *New York*, *supra*, 401 U.S. at pp. 222, 226.)

In conclusion, petitioner submits the Sixth Amendment should not sanction perjury in the name of the Constitution and respectfully requests this Court settle this important federal question.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the writ of certiorari should issue to review the decision of the California Court of Appeal in this case.

Dated: November 7, 1991.

DANIEL E. LUNGREN, Attorney General
of the State of California

GEORGE WILLIAMSON,
Chief Assistant Attorney General

HARLEY D. MAYFIELD,
Assistant Attorney General

FREDERICK R. MILLAR, JR.,
Supervising Deputy Attorney General

Pamela A. Ratner

PAMELA A. RATNER,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-7766

Counsel for Petitioner
State of California

PAR:ar
SD90DA0447

[No. G009230. Fourth Dist., Div. Three. June 21, 1991.]

THE PEOPLE, Plaintiff and Respondent, v.
CESAR ELIAS CRIBAS, Defendant and Appellant.

SUMMARY

A jury convicted defendant of rape (Pen. Code, § 261, subd. (2)), bribery of witnesses (Pen. Code, § 137, subd. (a)), and conspiring to bribe witnesses (Pen. Code, § 182). After defendant had been arrested, defendant's brother had offered the alleged rape victim and her boyfriend money if she withdrew the charges. Although defendant had asserted his right to counsel, the victim taped a telephone conversation with defendant upon the instruction of police officers. In the conversation, defendant admitted responsibility for the rape and requested the victim to withdraw the charges. The trial court denied defendant's motion to suppress the portion of the conversation relating to the rape, ruling that the statements were admissible for impeachment purposes. (Superior Court of Orange County, No. C-74030, Richard J. Beacom, Judge.)

The Court of Appeal reversed the rape conviction, remanded for resentencing on the bribery and conspiracy convictions, and in all other respects affirmed the judgment. It held that the taped conversation was obtained in violation of defendant's right to counsel, since he had previously invoked that right and the victim was working under the direction of police officers. Thus the statements regarding the rape were inadmissible for any purpose. It also held that there was substantial evidence to support the conviction of bribery of witnesses, notwithstanding that the evidence indicated defendant merely asked the victim to "drop the charges," since the brother's statements, attributable to defendant as a coconspirator, indicated a scheme in which the victim was to fabricate a story. (Opinion by Sonenshine, Acting P. J., with Crosby and Wallin, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a-1d) Criminal Law § 117—Interrogation; Advice as to Constitutional Rights—Victim's Obtainment of Defendant's Incriminating

Statements Upon Instruction of Police.—In a prosecution for rape and bribery of witnesses, the trial court erred in admitting, for impeachment, defendant's acknowledgment that he committed the rape, obtained in a recorded telephone conversation with the victim. Police officers were investigating the rape and the attempts of defendant and his brother to bribe the victim into withdrawing the charges. Defendant had invoked his constitutional rights upon his arrest, but the officers paid for a motel room for the victim and instructed her to give defendant her telephone number, so that he could call her from jail, and to record the conversation. Since the victim was acting at the behest of the officers and with motivation to assist them, and since the victim elicited defendant's incriminating statements, the statements were obtained in violation of defendant's right to counsel. Thus, the statements were inadmissible for any purpose. Further, although the statements were admitted only for impeachment, the error was reversible, since the references to the rape made the conviction for that offense more likely.

[See Cal.Jur.3d (Rev), Criminal Law, §§ 2193, 2194; 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 2695.]

(1) Criminal Law § 77—Rights of Accused—Aid of Counsel—Government Interrogation in Violation of Right.— The U.S. Const., 6th Amend., guaranty of right to counsel includes the state's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. Knowing exploitation by the state of an opportunity to confront the accused without counsel being present is as much a breach of the state's obligation not to circumvent the right to assistance of counsel as is the intentional creating of such an opportunity.

(2) Criminal Law § 128—Interrogation; Advice as to Constitutional Rights—Waiver of Rights—Effect of Voluntariness of Statement.— Voluntariness is the sine qua non in a challenge to the admissibility of defendant's statement under U.S. Const., 5th Amend. (privilege against self-incrimination), because there is no Fifth Amendment violation where statements are voluntary. But a purportedly voluntary statement violates U.S. Const., 6th Amend. (right to counsel), if it is secured after defendant has asserted the right to counsel and without any waiver of that right. Accordingly, in Sixth Amendment cases the question of voluntariness is not dispositive. Thus, in both Fifth and Sixth Amendment cases, the determinative factor is not whether the statements were voluntary or involuntary, but whether they were or were not obtained in violation of the Constitution.

(4) Rape § 2—Defenses—Intoxication.—Rape is a general intent crime, and intoxication is not a defense unless it rises to the level of unconsciousness.

(5) Bribery § 5—Prosecutions—Evidence—Bribing Witness—Requesting Victim to Withdraw Charges.—In a prosecution for bribery of a witness and conspiracy to bribe a witness (Pen. Code, §§ 137, subd. (a), 182), there was substantial evidence to sustain a conviction for violation of § 137, subd. (a). Although the evidence indicated that defendant did nothing more than ask a rape victim to "drop the charges" against him, there was other evidence supporting the conviction, including the delivery by defendant's brother of money to the victim and her boyfriend, and the brother's statements that he had suggested to the victim and her boyfriend that they fabricate a story. Since defendant and his brother were coconspirators, the brother's statements were attributable to defendant for purposes of the substantive offense.

[Validity, construction, and application of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness, note, 8 A.L.R.4th 769.]

(6) Bribery § 5—Prosecutions—Bribing Witness—Effect of Reversal of Conviction of Underlying Crime.—On appeal of a conviction of rape and bribing a witness (Pen. Code, §§ 261, subd. (2), 137, subd. (a)), reversal of the rape conviction did not require reversal of the bribery conviction. The gravamen of the offense proscribed by § 137, subd. (a) is the influencing of information given by someone who is or will be involved in legal proceedings. Whether the witness's original accusation is actually true is irrelevant, as is the result of the legal proceeding and whether the witness intends to carry out the agreement to testify falsely. Indeed, the underlying crime need not be prosecuted or even to have been committed at all.

(7) Conspiracy § 11—Criminal—Jury Instructions—Overt Act Underlying Conspiracy.—In a prosecution for conspiracy to bribe witnesses, the trial court's jury instructions regarding overt acts supporting underlying conspiracy were adequate. The trial court need not specifically instruct the jury they must unanimously agree as to the overt act done in pursuance of the conspiracy. It is only necessary that the jury agree that defendant committed some overt act in furtherance of the conspiracy. CALJIC Nos. 6.10 and 17.50 adequately apprised the jury of its duty. CALJIC No. 6.10 told the jury the proof of a conspiracy requires proof of at least one overt act. CALJIC No. 17.50 advised that all 12 jurors had to agree on a decision as to any findings in their

verdict. These most specific instructions must be viewed in conjunction with the unqualified requirement that proof be made beyond a reasonable doubt as to each element of an offense and that the verdict be unanimous.

COUNSEL

Charles R. Khoury, Jr., and Anthony Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren and John K. Van de Kamp, Attorneys General, Richard B. Iglehart, Chief Assistant Attorney General, Harley D. Mayfield, Assistant Attorney General, Janelle B. Davis and Pamela A. Ratner, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

SONENSHINE, Acting P. J.—Cesar Elias Cribas was convicted by a jury of rape (Pen. Code, § 261, subd. (2)),[1] bribery of witnesses (§ 137, subd. (a)), and conspiring with his brother, Danilo, to bribe witnesses (§ 182). He asserts a tape-recorded conversation between him and the victim was admitted in violation of the mandates of the United States Supreme Court in *Massiah* v. *United States* (1964) 377 U.S. 201 [12 L.Ed.2d 246, 84 S.Ct. 1199], and contained statements which were involuntary. He also challenges the sufficiency of the evidence to support the bribery-related convictions.

I

In March 1989, Cribas met Ernesto Rojas and his girlfriend, Luisa B., in the laundry room of the apartment complex where Cribas resided. Rojas and Luisa had been living with Rojas's uncle, but were having problems there. Cribas offered to allow them to move into his apartment, stating he would be glad to have help with the rent.

Sometime after the two moved into the apartment, Cribas made an unsolicited advance toward Luisa while Rojas was away. As Luisa was cooking, Cribas approached her, fondled one of her breasts, and put a hand down her

[1] All statutory references are to the Penal Code unless otherwise specified.

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pants. She became upset and told him to leave her alone. He did so and, when Rojas came home, Luisa told him what had happened. Rojas became angry and threatened to hit Cribas, but Luisa talked him out of it by pointing out they would have to move out and had no place to go.

On the following day, Cribas and Rojas were drinking. After a while, Cribas gave Rojas some money and the keys to his car and sent him out to buy some liquor. When Rojas left the apartment, Luisa started to follow but was stopped by Cribas. He took her to the couch and began kissing her forcefully. At one point, Luisa managed to break free and ran to the door, but Cribas followed her and locked it with the deadbolt.

Cribas forced Luisa onto the floor and began raising her skirt and spreading her legs. He then got up and carried Luisa into the bedroom, where he bolted the door and forcibly had intercourse with her. They then heard Rojas pounding on the bedroom door. Luisa broke free and unlocked the door, running into Rojas's arms, crying. Rojas called the police, who arrested Cribas and took Luisa to a clinic.

The next day, April 2, Cribas telephoned Luisa at the apartment and urged her to withdraw the charges so that he could get out of jail. He told her his attorney would take care of having the charges dropped. At this point, the connection was accidentally cut off. She could not remember whether Cribas offered to give her some money during this conversation.

That evening, Cribas's brother, Danilo, came to see Luisa and Rojas and asked them to help Cribas by withdrawing the charges, offering them $300. A few days later, he returned and offered them $500. Rojas told Danilo they would possibly help for $5,000. Rojas testified he tossed out that figure because he wanted to get rid of Danilo and knew he would never be able to raise that much money.

The following day, Rojas and Luisa were evicted from the apartment. They told the police about the telephone call from Cribas and the visits from Danilo. The police obtained a motel room for them and connected a tape recorder to the telephone. Police Officer Allen Caddell instructed them to give Danilo their new telephone number and to tell him to have Cribas call from jail. He also instructed them to accept any money offered by Cribas or Danilo. He told Luisa to speak with Cribas and ask him why he had raped her, in order to obtain his admission that he had indeed done so and to bolster the evidence of the bribery offense.

Cribas called on April 8 and first spoke with Rojas, telling him he was sorry. He said he had been drinking and did not know what he was doing.

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Cribas also spoke at length with Luisa.[3] He responded to her questioning by admitting he had raped her and pleading with her to withdraw the charges she had leveled, so that he could get out of jail. Luisa then asked him for

[3]The relevant portions of the taped conversation were transcribed as follows:
"L.B.: Huh? (What?)
"C.C.: My brother told me you wanted to talk to me.
"L.B.: Yes.
"C.C.: Uh, huh (Affirmative)
"L.B.: Look, Cesar.
"C.C.: Huh, huh (Affirmative)
"L.B.: If you answer these questions . . .
"C.C.: Uh, huh (Affirmative)
"L.B.: It is possible that I may be able to help you.
"C.C.: Yes, but as I told you, I want to, I want to help you right now, but, but, when I get out then I will. In here how can I be of help to you?
"L.B.: Huh? (What?)
"C.C.: While I am in here how can I help you? I can't help you in here and in whatever you need me for. I am here serving some time. But, I don't know what you want . . . or, what is the question you wanted to ask me?
"L.B.: They are questions. It is not only one question.
"C.C.: Uh, huh (Affirmative) Okay.
"L.B.: Look, I want to know why you raped me. What was your reason.
"C.C.: Huh? (What?)
"L.B.: I want to know why you raped me. What was your reason?
"C.C.: To tell you the truth, I cannot tell you, because, because when one is drunk, one does not know what he is doing, right?
"L.B.: You don't know what you did?
"C.C.: Uh, huh (Affirmative)
"L.B.: But, you did it.
"C.C.: Yes, that is why I'm telling you because when one is very drunk one does not know what he is doing. Since Friday, I was drinking and INAUDIBLE
"L.B.: But you do admit that you did it?
"C.C.: Huh? (What?)
"L.B.: You do accept the fact that you did rape me?
"C.C.: Uh, huh (Affirmative) Well, I accept it.
"L.B.: Okay. The other one.
"C.C.: Uh, huh (Affirmative)
"L.B.: I think that my neighbors found out that I was crying. There are witnesses.
"C.C.: Uh, huh (Affirmative) INAUDIBLE
"L.B.: The last one.
"C.C.: Uh, huh (Affirmative)
"L.B.: Did you enjoy doing what you did to me?
"C.C.: Oh, well, I don't know. INAUDIBLE
"L.B.: What?
"C.C.: No, no, no, I don't think it was right.
"L.B.: You did not think it was right what you did?
"C.C.: No . . . INAUDIBLE Uh, uh (No)
"L.B.: Yes, because my husband is upset.
"C.C.: Yes, I know. I would also be upset. INAUDIBLE
"L.B.: Can you imagine: [sic] how I feel knowing that you forced me? Answer me.
"C.C.: Yes, I can imagine how you feel. Certainly. It's true. When one is drunk one does not know.
"L.B.: No, now you don't know, but you did do it."

money, which he claimed he did not have and could not get as long as he was in custody. The contents of the conversation were recorded and a transcription of the portion relating to the bribery was admitted into evidence.

Later, Luisa and Rojas received a call from Danilo, which they also recorded, asking if they had spoken with Cribas and offering them money. In another call, they settled on an amount with Danilo, and he was arrested when he went to their motel to deliver it.

At trial, Cribas testified that after Rojas left to buy the liquor, Luisa approached him while he was in his bedroom making a telephone call. She made sexual overtures and he tried to respond, but was unable to achieve an erection. He did not know the bedroom door was locked and believed Luisa locked it. When Rojas began shouting and knocking on the door, Luisa unlocked it and began crying. Cribas also denied touching Luisa the day before.

Following his arrest, Danilo told Cribas he was going to speak to a lawyer about getting Luisa to drop the charges. He told Cribas Luisa wanted to talk to him before she would agree to help, and gave him her number. When Cribas called, Luisa asked him a lot of questions. He told her what she wanted to hear, in hopes of convincing her to withdraw the charges. On cross-examination, the prosecutor questioned Cribas extensively on the portion of the recorded telephone conversation containing admissions to the rape.

II

Cribas moved to suppress the portion of the recorded statements elicited in the telephone conversation with Luisa relating to the rape, on the ground they violated his Sixth Amendment right to counsel. It was stipulated that, at the time of the taped telephone conversation, counsel had been appointed to represent Cribas. The court denied the motion and ruled the statements could be used to impeach Cribas's testimony.

(1a) Cribas's primary contention on appeal is that Luisa was acting as an agent of the police and conducting an interrogation at the behest of Officer Caddell. Because he had an attorney at the time and he had invoked his *Miranda*[1] rights when the police attempted to question him, he asserts this government action interfered with his Sixth Amendment right to counsel.

[1] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed. 694, 86 S.Ct. 1602, 10 A.L.R.3d 974].

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The Attorney General responds that Luisa was not a government agent and Cribas waived his rights when he initiated the telephone call; further, the police action in recording the call was designed to investigate a new crime, i.e., the bribery of a witness.

Cribas's argument is founded upon a line of United States Supreme Court decisions interpreting the Sixth Amendment, beginning with *Massiah* v. *United States*, *supra*, 377 U.S. 201. The *Massiah* court held that postindictment communication with an accused, deliberately elicited by a codefendant acting as an agent of the government, interferes with the right to counsel. (*Id.* at p. 206 [12 L.Ed.2d at p. 250].) Applying this rule in *United States* v. *Henry* (1980) 447 U.S. 264 [65 L.Ed.2d 115, 100 S.Ct. 2183], the court found the government had violated Henry's right to counsel when it deliberately elicited statements through a paid informer who was an inmate at the same jail. Even though the informer had been instructed by the government not to initiate any conversation or ask any questions, he had engaged Henry in conversation certain to evoke incriminating statements.

Three factors were highlighted in *Henry*: The informer was acting under instructions from the government; he was ostensibly no more than a fellow inmate; and Henry was in custody at the time. (*Id.* at p. 270 [65 L.Ed.2d at p. 123].) The court observed that informers generally have an incentive to produce useful information for the government. And, they can take the defendant unawares because the defendant may say things which he or she would not intentionally reveal to government agents. Moreover, there is a "powerful psychological inducement to reach for aid when a person is in confinement. [Citations.] . . . [T]he mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." (*Id.* at pp. 270-274 [65 L.Ed.2d at p. 124].)

These principles were carried a step further in *Maine* v. *Moulton* (1985) 474 U.S. 159 [88 L.Ed.2d 481, 106 S.Ct. 477], where the represented defendant initiated a telephone conversation with a codefendant who, unbeknown to Moulton, was cooperating with the state. A meeting was arranged in order to discuss their trial strategy, at which their conversation was recorded. The state maintained there was no interference with the right to counsel, because Moulton had initiated the telephone call and the meeting. The Supreme Court rejected such a distinction, pointing out "the identity of the party who instigated the meeting at which the Government obtained incriminating statements was not decisive or even important to our decisions in *Massiah* or *Henry*." (*Id.* at p. 174 [88 L.Ed.2d at p. 495].)

(2) The court explained that the Sixth Amendment guarantee "includes the State's affirmative obligation not to act in a manner that circumvents the

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protections accorded the accused by invoking this right. . . . [K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creating of such an opportunity." (*Id.* at p. 176 [88 L.Ed.2d at p. 496].)

(1b) The prosecution had also asserted the statements were admissible because the police had other, legitimate reasons for recording the conversation: The officers wanted to protect the informer's safety in case Moulton found out he was cooperating with them, and they were attempting to gather information about a new offense he was contemplating. The court held these legitimate interests did not justify the use of unlawfully obtained statements at the trial of those charges for which Moulton was represented by counsel. There was no bar, however, to their use in a trial of the new offense. (*Id.* at p. 180 [88 L.Ed.2d at p. 498].)

In *Kuhlmann* v. *Wilson* (1986) 477 U.S. 436 [91 L.Ed.2d 364, 106 S.Ct. 2616], the high court drew the line at statements which were not elicited, but which were overheard by a paid informant placed in the defendant's cell and told to report any incriminating statements. The so-called "listening post" situation marked the first departure from the policy that "the courts must focus on the state's conduct as a whole, rather than on the informant's." (*People* v. *Whitt* (1984) 36 Cal.3d 724, 741 [205 Cal.Rptr. 810, 685 P.2d 1161].)[4]

With this background, we turn to the facts of the case before us. It is undisputed that Luisa was acting at the behest and encouragement of Officer Caddell to assist him in gathering additional evidence. And, to the extent she was receiving a motel room at taxpayer expense, she was also a paid informant. Indeed, she and Rojas were apparently desperate for a place to live. At oral argument, the Attorney General posited that the consideration they received was not a motivating factor in their cooperation. We disagree. Moreover, it can hardly be claimed that a person claiming to be a victim of a violent crime has no motivation to assist police in gathering evidence to corroborate her allegations. Luisa quite clearly had several incentives to produce useful information.

[4] *Whitt* was decided prior to *Kuhlmann* and focuses on whether the informer is acting at the behest of the police or on his or her own initiative. Whether the informer was just listening or questioning the defendant was found irrelevant in Whitt. (*People* v. *Whitt*, *supra*, 36 Cal.3d at p. 742.) This is in sharp contrast to *Kuhlmann*, where the police did place the informer in an opportune position, but the informer did nothing but listen. However, the portion of *Kuhlmann* which addresses this issue was not necessary to that decision. It primarily concerned the propriety of the court of appeals entertaining a petition for habeas corpus from the prisoner. The Supreme Court found the lower court had acted improperly; it then stated that even if it correctly entertained the petition, it erred in granting *Massiah/Henry* relief.

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Turning to the other factors, Cribas, who had no knowledge he was speaking indirectly to the police, had already asserted his right not to incriminate himself. And, of course, he was in custody at the time of the call. Reviewing the substance of the call, Luisa was undeniably eliciting responses and was not simply a passive listener.

The Attorney General contends Cribas initiated the interrogation by voluntarily placing the telephone call.[9] But the same was alleged of the defendant in *Moulton*, who made an unsolicited call, which was recorded, to his codefendant and arranged a meeting. The court found the question of who initiated the call was irrelevant. (*Maine* v. *Moulton*, *supra*, 474 U.S. at pp. 174-175 [88 L.Ed.2d at p. 495].) "It is [] irrelevant to the *Henry* analysis that an accused's statements were voluntarily made. 'Since "coercion" is not a Sixth Amendment question, "voluntariness" simply plays no part in the test of admissibility.' [Citation.]" (*People* v. *Whitt*, *supra*, 36 Cal.3d at p. 742.)

And, it cannot candidly be asserted that Cribas voluntarily initiated the call. Cribas had placed one unsolicited phone call the day after the rape during which he did no more than beg Luisa to withdraw the charges. Thereafter, his brother handled the matter. Through him, Rojas and Luisa continually held out hope to Cribas that she would help him. Luisa, at Caddell's insistence, told Danilo to give Cribas her new phone number and have him call her. This was phrased as a condition precedent to any further discussion of her dropping the charges.

As pointed out in *Henry*, an incarcerated defendant is especially vulnerable to such incentives. The police used Cribas's desperation as a means of circumventing his right to have counsel present at any questioning, a right he had asserted immediately upon his arrest. Thus, even if an initiation argument were available in this context, we would reject it.

In every sense, the police deliberately created the setting and led Cribas into it. Surreptitious questioning was conducted at their request about a matter on which counsel had been appointed.

Next, the Attorney General argues the police were investigating a new crime and were therefore not interfering with the right to counsel for the offense on which Cribas was represented. We would readily agree if it were

[9]The Attorney General's reliance on *Edwards* v. *Arizona* (1981) 451 U.S. 477 [68 L.Ed.2d 378, 101 S.Ct. 1880] is misplaced. The *Edwards* court held an accused who has invoked *Miranda* rights may not be questioned unless a further conversation is initiated by the accused and there is another admonishment. It is based on the Fifth Amendment, which is not at issue here.

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not for the fact Caddell specifically instructed Luisa to obtain an admission from Cribas that he had raped her. Caddell testified one of his purposes was to obtain corroboration of *the rape*. Defense counsel's motion in the lower court was directed only at the first portion of the phone call, which contained damaging admissions about the rape; no effort was made to challenge the latter half, in which Cribas negotiated with Luisa for his release. The portion concerned with the admission of rape could readily have been excised without threatening the evidence of the new crime. In fact, during the trial, only the portion of the tape relating to the bribery charge was admitted in the prosecution's case in chief; the remainder was introduced only as impeachment of Cribas's testimony.

Thus, we must determine whether statements obtained in violation of *Massiah* may be used to impeach the testimony of a defendant. In *People* v. *Harper* (1991) 228 Cal.App.3d 843 [279 Cal.Rptr. 204], the court concluded they could not, distinguishing the recent United States Supreme Court decision in *Michigan* v. *Harvey* (1990) 494 U.S. 344 [108 L.Ed.2d 293, 110 S.Ct. 1176]. The *Harper* court summarized *Harvey* as holding that "a statement taken in violation of 'only a prophylactic rule' may be used for impeachment purposes. It does not, however, follow that a statement taken in violation of the Constitution may be used for impeachment purposes." (*Harper, supra*, at p. 851.) The court agreed that violations of prophylactic rules designed to ensure knowing and intelligent waivers were not a bar to use of illegally obtained statements for impeachment where the problem is an *imperfect* waiver. However, it found these rules have "little application where there is no question of waiver. The statement, taken after appellant was indicted, and without any waiver of his right to counsel, simply and unequivocally violated the Sixth Amendment." (*Id.* at p. 852.)

Nor is the fact the statements were otherwise voluntary dispositive. (3) Voluntariness is the sine qua non in a Fifth Amendment challenge because there is no Fifth Amendment violation where statements are voluntary. But "[a] purportedly voluntary statement violates the Sixth Amendment if it is secured after a defendant has asserted the right to counsel and without any waiver of that right. Accordingly, in Sixth Amendment cases the question of voluntariness is not dispositive." (*Id.* at p. 853.) Thus, in both Fifth and Sixth Amendment cases, the determinative factor is not whether the statements were voluntary or involuntary, but whether they were or were not obtained in violation of the constitution. We have already determined the statements in this case were.

(1c) In determining whether Cribas was prejudiced by the admission of evidence obtained from a *Massiah* violation, the harmless error test of *Chapman* v. *California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824, 24

A.L.R.3d 1065] applies. (*Milton* v. *Wainwright* (1972) 407 U.S. 371, 372 [33 L.Ed.2d 1, 3-4, 92 S.Ct. 2174].) As is typical in rape cases, the evidence consisted primarily of testimony by the accused and the victim. The statements made by Cribas during the telephone conversation acknowledged culpability, but tempered the admission with remarks that he was drunk and did not know what he was doing:

"L.B.: You don't know what you did?

"C.C.: Uh, huh (Affirmative)

"L.B.: But, you did it.

"C.C.: Yes, that is why I'm telling you because when one is very drunk one does not know what he is doing. Since Friday, I was drinking and

INAUDIBLE

"L.B.: But you do admit that you did it?

"C.C.: Huh? (What?)

"L.B.: You do accept the fact that you did rape me?

"C.C.: Uh, huh (Affirmative) Well, I accept it."

The admission that he raped Luisa and accepted responsibility for it are no less damaging because of his drinking. (4) Rape is a general intent crime, and intoxication is not a defense unless it rises to the level of unconsciousness. (1d) And, Cribas tendered an apology to Rojas for his conduct during his first phone call. That statement, which contained similar incriminating material, was properly before the jury. However, this was readily explained in the context of Cribas's defense that Rojas and Luisa were lying because they had set him up in an attempt to extort him.

While counsel gamely argued the recorded statements were made in order to tell Luisa whatever she wanted to hear, there is no denying that a recorded statement containing his concession of guilt was damaging to his defense. Moreover, this is not a case where other physical or testimonial evidence combined to produce an overwhelming case.

Looking at the conduct of the jury, it did not arrive at its verdicts until after deliberating for approximately nine hours over a two-day period. During that time, it requested rereading of Luisa's testimony regarding the day

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of the rape and sought guidance on the conspiracy instruction. The entire trial, even though conducted through interpreters, lasted only slightly more than two days. Apparently, the jury did not view its decision as clear cut. We cannot say beyond a reasonable doubt that the jury would have reached the same verdict on the rape count in the absence of these admissions.

Thus, upon retrial, the prosecution may not use Cribas's statements relating to the rape, which we quote in footnote 2, *ante*, against him in any manner.[6]

III

(5) Cribas contends there is no evidence supporting the jury's conclusion he committed an act specified within section 137, subdivision (a), which provides that any person who "gives or offers, or promises to give, to any witness, person about to be called as a witness, or person about to give material information pertaining to a crime to a law enforcement official, any bribe, upon any understanding or agreement that the testimony of such witness or information given by such person shall be thereby influenced is guilty of a felony." The information alleged Cribas offered money to Rojas and Luisa to influence their testimony or the information they provided to the police.

Cribas asserts the evidence established he did nothing more than ask Luisa to drop the charges. The Attorney General does not appear to contest this characterization of the evidence, but argues it "would be ludicrous to conclude that an agreement to get the witness 'to drop' a case does not reasonably mean 'to influence a witness not to testify.'" He points out because Luisa did not have the authority to dismiss the case, the only way she could drop the charges was by refusing to testify. However, he points to no evidence Cribas knew that.

Cribas cites *Lichens* v. *Superior Court* (1960) 181 Cal.App.2d 573 [5 Cal.Rptr. 539] which, as he asserts, is strikingly similar to the instant case. Lichens had repeatedly offered to pay his attempted rape victim $500 to "drop the case." He was charged with bribery of a witness under former section 136 1/2 (amended and renumbered as § 138).[7] The appellate court

[6]We therefore need not reach Cribas's argument, that the statements to Luisa were involuntary. That issue is directed to the same portion of the recorded conversation. Similarly, we do not reach Cribas's contention that the court erred in denying his request to instruct the jury to disregard the same statements if it found them the product of coercion.

[7]The only apparent difference between section 138, subdivision (a) and section 137, subdivision (a) is the former prohibits bribing "upon any understanding or agreement that the person shall not attend upon any trial or other judicial proceeding," or attempting to dissuade such attendance. Section 137, subdivision (a) prohibits giving or offering to give a bribe under

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issued a writ of prohibition, observing that using money to induce the victim to "drop the charge" was not unlawful because only the district attorney could consent to a dismissal. Moreover, it was not the equivalent of inducing her not to attend the trial. (*Id.* at p. 576.)

The Attorney General relies on *People* v. *Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685, 646 P.2d 847]. In *Pic'l*, the defendant drafted a document in which the victim agreed to "'seek dismissal of all criminal charges which may have been filed . . . and to do everything within my power to prevent the filing of any additional charges against any person.'" He also agreed to "'refuse to prosecute criminal charges against anyone.'" The Supreme Court held it was reasonable for the grand jury to have concluded that non-attendance was within the scope of the agreement "to 'do everything within my power'" and his agreeing to "'refuse to prosecute'" reasonably contemplated refusing to testify. (*Id.* at p. 740.)

While not directly disapproving *Lichens*, *supra*, 181 Cal.App.2d 573,[5] the court distinguished it by noting the victim in *Pic'l* had a greater burden in fulfilling his agreement: "he had to '*refuse* to prosecute' and 'do *everything*' to prevent further charges. Absenting himself from trial would have been an obvious means of keeping the bargain." (*Id.* at p. 741.) The court concluded an indictment under former section 136 1/2 "may be supported by an inference, based on the defendant's words or actions, that he has violated the statute; no express statement by the defendant of his intent to prevent the witness' testimony is required." (*Ibid.*)

Applying these principles, the instant case more closely resembles the facts in *Lichens*. Here, too, Cribas did no more than ask Luisa to drop the charges. She testified that during their first telephone conversation, he said he could not continue to help them while in jail and that his attorney would handle having the charges dropped. In their recorded telephone conversation, Cribas again asked Luisa repeatedly to help him get out of jail and once referred to her dropping the charges, but insisted he did not have the money she wanted. Asking her to withdraw the charges is no more the equivalent of influencing her testimony than it is of inducing her not to attend the trial.

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an agreement or understanding that it will influence the testimony of a witness or information given to law enforcement.

Cribas was originally also charged with violating section 138, subdivision (a) and section 136.1, subdivision (c)(2). During the trial the court dismissed those counts pursuant to section 1118.1.

[5]The Supreme Court expressly declined to reach the issue of the continued viability of *Lichens* in the face of the subsequent amendment of Penal Code section 136 1/2. (*Id.* at p. 741, fn. 4.) We are not confronted with the distinction between the old and new versions of the statute.

However, assuming *Lichens* was correctly decided, Cribas gains little solace from this conclusion, because there is other evidence, not cited by either party, which is sufficient for conviction. Rojas testified that in one of his conversations with Danilo, Danilo suggested he say that on the day of the incident Rojas was drunk, had hit Luisa, and that she suffered from "nervousness" and did not know what had happened.

Because Cribas and Danilo were established as conspirators, Danilo's statements are attributable to Cribas for purposes of the substantive offense. (*People* v. *Brawley* (1969) 1 Cal.3d 277, 289 [82 Cal.Rptr. 161, 461 P.2d 361].) In fact, the jury was instructed with CALJIC No. 6.11, relating to joint liability for statements or acts of conspirators.[9] It would have been well within reason for the jury to attribute Danilo's statements to Cribas.[10]

These words and Danilo's subsequent action in delivering the money lead to a reasonable inference that the objective was to persuade Rojas and Luisa to falsify a statement to the police or in court about the rape. There was substantial evidence to support the conviction.

IV

(6) Cribas asserts reversal of his rape conviction requires reversal of the bribery and conspiracy convictions. He claims if no crime occurred, neither Luisa nor Rojas fit the definition of a "person about to be called as a witness" to a crime under the bribery statute. Because of the erroneous admission of the statements, he continues, the jury found him guilty of rape without properly considering this issue.

CALJIC No. 7.03, as read to the jury, defined the phrase as follows: "A 'person about to be called as a witness' includes: [any person who knows or

[9] "Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if said act or said declaration is in furtherance of the object of the conspiracy. [¶] The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators. [¶] A member of a conspiracy is not only guilty of the particular crime that to [his] [her] knowledge [his] [her] confederates are contemplating committing, but is also liable for the natural and probable consequences of any act of a co-conspirator to further the object of the conspiracy, even though such act was not intended as a part of the original plan and even though [he] [she] was not present at the time of the commission of such act. . . ."

[10] Notably, the jury, in its verdict on the conspiracy charge, specifically found conspiracies to commit *both* sections 137, subdivision (a) and 136.1, subdivision (b). The latter section prohibits attempting to "prevent or dissuade another person who has been the victim of a crime or who is witness to a crime" from pursuing a variety of legal actions. Cribas had originally been charged with this offense but the prosecutor, in midtrial, dismissed this count at the same time as the section 136 allegation, choosing instead to proceed by interlineating a section 137, subdivision (a) charge. Under the circumstances, the dismissal of the section 136.1, subdivision (b) charge may have been ill-advised.

who has been told that [he] or [she] will be called as a witness] or [any person who is a material witness to the issues of a case which already has been filed or which thereafter may be filed] or [any person about to give material information pertaining to a crime to a law enforcement official.]" Cribas points out the phrase "pertaining to a crime," in the third alternative bracketed definition, may have been the one upon which the jury settled. He interprets this phrase as requiring a crime which was actually committed.

This interpretation has utterly no legal or logical basis. The gravamen of the offense is the influencing of information given by someone who is or will be involved in legal proceedings. Whether the witness's original accusation is actually true is irrelevant, as is the result of the legal proceeding and whether the witness intends to carry out the agreement to testify falsely. (*People* v. *Pic'l*, *supra*, 31 Cal.3d at p. 739.)

As the Attorney General explains, the underlying crime need not be prosecuted. And, if there is a prosecution and the evidence proves insufficient for conviction, the offense of bribery is not diminished. There is nothing in the phrase "pertaining to a crime" from which we must conclude it means a crime which has actually been committed. More to the heart of the matter, even an acquittal does not mean a crime did not occur; it simply relieves the defendant of culpability.[11]

V

(7) Cribas objects to the failure of the court to instruct, sua sponte, pursuant to CALJIC No. 17.01, that the jury had to agree unanimously on the overt act or acts underlying the conspiracy charge or on the definition of a witness set forth in CALJIC No. 7.03 (see § IV, *ante*). There was no error.

We are persuaded that a specific unanimity instruction on overt acts was not required: "Inasmuch as the overt act, though required to establish the existence of a conspiracy, is not an actual element of the crime, it follows that the jury need only be unanimous in finding *an* overt act was done in furtherance of the conspiracy, not in finding a particular act was done. . . . Hence, the overt act is part of the 'theory' of the case, not an act constituting the offense. [Citation.] For the foregoing reasons, . . . a trial court need not instruct the jury they must unanimously agree as to the overt act done in pursuance of a conspiracy." (*People* v. *Jones* (1986) 180 Cal.App.3d 509, 516-517 [225 Cal.Rptr. 697].) Cases taking a contrary position have done so in dicta, with which we disagree. (*People* v. *Ramirez*

[11] The defense argument, taken to its logical conclusion, would mean a person who bribed a witness could not be prosecuted if acquittal on the underlying charge results from the subborned perjury.

(1987) 189 Cal.App.3d 603 [233 Cal.Rptr. 645], *People* v. *Brown* (1991) 226 Cal.App.3d 1361 [277 Cal.Rptr. 309].)

CALJIC Nos. 6.10 and 17.50 sufficiently apprised the jury of its duties. CALJIC No. 6.10 told the jury that proof of a conspiracy requires proof of at least one overt act. CALJIC No. 17.50 advised that all 12 jurors had to agree on a decision and to any findings in their verdict. "These most specific instructions must be viewed in conjunction with the unqualified requirements that proof be made beyond a reasonable doubt as to each element of an offense and that the verdict be unanimous. There is no inadequacy in the instruction given." (*People* v. *Skelton* (1980) 109 Cal.App.3d 691, 717 [167 Cal.Rptr. 636].)

For much the same reason, the CALJIC 17.01 instruction was not required for the definition of a "person about to be called as a witness." This constitutes a theory of guilt, on which a jury need not be specifically instructed they must agree. (*People* v. *Failla* (1966) 64 Cal.2d 560, 569 [51 Cal.Rptr. 103, 414 P.2d 39].)

As to the rape count, the judgment is reversed. Accordingly, the matter is remanded for resentencing on the bribery and conspiracy convictions. In all other respects, the judgment is affirmed.

Wallin, J., and Crosby, J., concurred.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
SEP 26 1991
Robert Wandruff Clerk
DEPUTY

THE PEOPLE, Respondent

v.

CESAR ELIAS CRIBAS, Appellant

Petitions for review DENIED.

LUCAS
Chief Justice

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AFFIDAVIT OF SERVICE BY MAIL

Attorney:

DANIEL E. LUNGREN
Attorney General of
the State of California
FREDERICK R. MILLAR, JR.,
Supervising Deputy Attorney General
PAMELA A. RATNER,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101

No. October Term, 1991

THE STATE OF CALIFORNIA,

Plaintiff,

v.

CESAR ELIAS CRIBAS,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

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Clerk, California Supreme Court
3580 Wilshire Blvd.
Los Angeles, California 90010

Charles R. Khoury, Jr.
Attorney at Law
P. O. Box 1066
Wilton, N.H. 03086

Court of Appeal
Fourth Appellate District, Division 3
925 N. Spurgeon Street
Santa Ana, CA 92701

Appellate Defenders, Inc.
233 A Street, Suite 1310
San Diego, CA 92101

Michael R. Capizzi
District Attorney
P. O. Box 808
Santa Ana, CA 92702-0808

Hon. Richard J. Beacom, Judge
c/o Martin J. Moshier, County Clerk
351 N. Arrowhead Avenue
San Bernardino, CA 92415

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, November 19, 1991.

Arlene M. Ryan
ARLENE M. RYAN

Subscribed and sworn to before me
this 19th day of November 1991.

Jean M. Burns
Notary Public in and for said County and State

JEAN M. BURNS
NOTARY PUBLIC - CALIFORNIA
THE COUNTY OF SAN DIEGO
My Commission Expires Sept. 17 1995